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DISPELLING MYTHS

In this issue, we're going to try to dispel a couple of myths. It's not uncommon for employee advocates (in attempting to extract an employee from the hole into which they have dug themselves) to expound these myths in attempting to convince you to take a different course of action.

The first myth deals with the concept of disparate treatment in dealing with employee discipline penalties. In the March-April 2000 issue, we told you about the "Douglas Factors." Douglas Factor #6, (Consistency of the penalty with those imposed on other employees for the same or similar offenses) is often used to argue, and "You can't fire Fred for his AWOL last Friday, because Mary was only reprimanded for AWOL." Well, don't you believe it! In *Disparate Treatment*, on page 2, we'll show you how the Merit Systems Protection Board deals with that argument on appeal.

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QUIZ TIME

On Monday morning you, Richard's supervisor, arrive at your desk to find a report from Hospital Security.

The report indicates that on Saturday, a typewriter (value $1,100) was found. It was recovered from Richard's car in the Command's parking lot.

You call Richard into your office and confront him. He says, "I always get caught." You decide discipline is warranted.

What is the appropriate charge?

a) Theft of Government Property?

b) Grand Theft?

c) Unauthorized Possession of Government Property?

d) Stupidity

(See "Unauthorized Possession of Government Equipment - Page 4)

DISPELLING MYTHS

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The second myth deals with your obligation to provide reasonable accommodation to your employee suffering from the latest fad workplace affliction. Yes, believe it or not, employees have argued that the stress caused by their supervisor has disabled them for their job and they are thus entitled to "reasonable accommodation." *Workplace Stress*, on page 3, gives you some insight into how the Board deals with that issue.

We're not suggesting here that all employee advocates always try to pull the "wool over your eyes." Some outstanding advocates recognize that disruptive employees can make everyone's work life miserable, and, that for the sake of the entire organization, such employees need to either change their behavior or find work elsewhere. Theirs' is not an easy job! But there are others...

DISPARATE TREATMENT

Employees appealing a disciplinary action will oft times argue that the penalty imposed was too harsh because it was more severe than the penalty imposed on another employee who had committed the same offense. Is their legitimacy to this disparate treatment argument? Let's see.

The basic premise for avoiding disparate treatment is "like penalties for like offenses." Over the years, however, this general rule has been molded and shaped by decisions of the Merit Systems Protection Board (the Board) and the Courts. In GILMORE v. DEPARTMENT OF ARMY (1981), the Board held an agency may impose different sanctions for similar offenses if its decision is based upon full consideration of all the relevant Douglas Factors.[1]

In later cases, the Board decided that some conduct is so extreme that disparate application of penalties would not be an issue and the fact that lesser penalties may have been earlier imposed does not mean that a more severe penalty is unreasonable. In essence, the Board has said that in such cases a disparate treatment argument would not carry much weight because a severe penalty would not be found to be an abuse of discretion[2].

The Board further chiseled the disparate treatment argument by deciding that to prove disparate treatment, the cases must involve similarly situated employees. The concept of similarly situated employees has three elements:

1. The offenses of the two employees must be similar with regard to the charge and the fact pattern behind the charge. (Even though the charge may be the same, i.e. theft, disparate treatment will not be found if the fact patterns, i.e. a $2 item vs. a $500 item, are significantly different.)

2. The comparisons must be made between employees within the same organization. (Disparate treatment may not be found if the comparisons, for example are being made between an employee in the Comptroller Department and an employee in the Supply Department.)

3. The comparisons must be made between employees occupying relatively similar positions of trust and responsibility. (Disparate treatment may not be found if the Disbursing Officer is removed for fraud, while a clerk is reprimanded for fraud.)

As should be apparent by now, the principle of "like penalties for like offenses" is not one that can be or is enforced with perfect consistency. The Board has established many exceptions. But it has also made clear that an agency's penalty will not be sustained if:

1. The agency has knowingly and intentionally treated similarly situated employees differently; **or**

[1] *See March-April 2000 issue for an explanation on the Douglas Factors*

[2] *A finding of an abuse of management discretion in imposing a sanction against an employee is the only basis upon which the Board may mitigate an agency imposed penalty to a lesser form of penalty on appeal*

2. Where an agency has consistently imposed the same penalty for an offense, it imposed a more stringent one without giving fair warning.

In reality, it is difficult for an appellant to prove disparate treatment. Few agency actions are overturned by the Board on that basis. Many cases have however, been overturned or mitigated because the deciding officials did not consider the appropriate Douglas factors.

While supervisors and managers need to be concerned with fairness and equity, their decisions concerning a disciplinary penalty needs to be based on a reasoned analysis of all relevant Douglas factors.

WORKPLACE STRESS

One of the things I find fascinating about the business I'm in is the attempts by some employees to shift the onus for their life's misfortunes onto the back of the employer.

Not too many years ago, drug abusers argued they were "handicapped employees" and their employer was obligated by the Rehabilitation Act to "reasonably accommodate" their handicapping condition. The accommodation they typically sought was to not get fired because they had stolen from the employer to support their habit.

Congress remedied that when they enacted a provision in the Americans With Disabilities Act that specifically excluded illegal drug abusers from the definition of disabled employees.

The latest, it seems, is arguing that "something" in the workplace is causing employees so much stress as to disable them from performing their job at the current work location. So far, these "something's" have included their supervisors, their co-workers, and mysterious fumes.

Employees have brought in medical certification saying they were disabled from working for their supervisors, or with their coworkers, or in a particular room or building. Their advocates then go on to argue that since they are disabled, you as their supervisor, are obligated to reasonably accommodate their disability by ridding their workplace of yourself, or their coworkers or by finding them another job. (And you can bet it's not one with a lower salary!)

This job stresses me out!
I need accommodation!

How does the Merit Systems Protection Board view such arguments? In MANUEL v. V.A. (1993), the Board found:

> "The question of who is a handicapped person under the Rehabilitation Act is an individualized one, focusing on whether the particular impairment constitutes a significant barrier to employment for the particular person. The fact that an impairment prevents an employee from meeting the demands of a particular job does not mean that she is handicapped; the impairment must foreclose generally the type of employment involved."

Thus a Widget Mechanic whose disdain for his supervisor has stressed him to the point he is no longer able to work for the supervisor would not be considered a handicapped employee under the Rehabilitation Act because he is not disabled from manufacturing and repairing widgets in general. He is disabled only from manufacturing and repairing widgets for his supervisor.

The Office of Personnel Management similarly applies this same criterion in reviewing an employee's application for disability retirement. Further, employees submitting claims for compensation based on such disabilities have generally not been successful.

Electronic Forms

It can be frustrating trying to find federal forms. OPM recently placed many of the standard government forms on their web site. You can find them at www.opm.gov/forms/index.htm. My personal favorite is the SF-71 (Application for Leave) (have you seen how huge that form is these days?). You can find leave-related forms at www.opm.gov/oca/leave/html/formindx.htm.

Unauthorized Possession of Government Equipment

While certainly Richard is guilty of it, if you answered "(d) Stupidity," you're wrong. Stupidity is generally not a disciplinary offense.

If you catch on fast, you probably guessed the proper charge. After all, our article is titled "Unauthorized Possession of Government Equipment." [That would be (c)]. Here's why:

On appeal, you must be able to establish that Richard was guilty of the offense with which he was charged. The elements needed to prove an unauthorized possession charge are:

(1) The property was government property;

(2) It was in Richard's possession; **and**

(3) Richard did not have permission from an authorized agent to have the property.

Unless Richard could, in fact, prove he had permission from an authorized agent to possess the typewriter in his vehicle, you're home free.

If, on the other hand, you charge Richard with "Theft," you will have an additional element to prove. You will have to prove Richard took the typewriter with the *INTENT* to deprive the government of the property and appropriating the property for his own use or benefit.

Proving "intent" can be a *very* difficult task. If Richard claims he was merely *borrowing* the typewriter and intended to return it at a later date, and there was no evidence to refute his claim, Richard would probably prevail on appeal if you charged him with "theft."

Furthermore, on appeal, the judge will not mitigate a charge. You either prove it or you lose. The judge will only determine if the appellant is guilty of the charged offense. Thus even though the evidence would demonstrate Richard was guilty of "unauthorized possession," if you charged him with theft and could not prove the additional element of intent, the judge will order the discipline reversed.

There are a number of other charges which also entail proving the element of intent. Among those are Fraud, Assault, and Insubordination.

Got Ideas? You can contact us at nwlabor_nw@nw.hroc.navy.mil. We would enjoy hearing your ideas for our newsletter.

Other Helpful Resources

Past Issues of Labor News and Views www.bangor.navy.mil/subase/hro/HRSC/News.htm
Looking for your HRO? www.bangor.navy.mil/subase/hro/general/index.html
General Labor Relations information: www.donhr.navy.mil/managers/dealing_with_unions.asp
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